Sounding the Canon: How Judges Use Canonical Literary Citations to Bolster the Authority of Natural Rights Jurisprudence

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V. COME YOU SPIRITS, UNSEX ME HERE: CONSIDERING THE CRITICAL RACE AND GENDER CRITIQUE OF THE WESTERN CANON AS HARMFULLY EXCLUSIONARY 22

I. INTRODUCTION: MUCH ADO ABOUT SOMETHING

If one were to ask readers of a legal opinion what, exactly, composes the document they are reading, such readers might echo *Hamlet*, glibly replying "[w]ords, words, words."[1] And they would not be wrong. Judicial opinions function as a collection of written words that define, apply, or overrule existing law. However, a discerning legal reader might inquire about the authority that gives clout to words in judicial opinions. This question is crucial because if judges have no enhanced or special authority regarding language, then judicial opinions risk being unable to persuade a democratic society that courts issue valid law.[2] As an unelected branch, the judiciary faces a higher burden to satisfy the American electorate, particularly when judicial opinions draw on uncodified natural law or natural rights principles.[3]

Considering that judicial opinions either enforce laws or invalidate laws as illegitimate, judicial citations to literature may puzzle legal readers or seem like superfluous dicta.[4] Indeed, Justice Cardozo begins *Law and Literature* with the statement, "I am told at times by friends that a judicial opinion has no business to be literature," and continues, "[a] commoner attitude with lawyers is one, not of active opposition [to literature], but of amused or cynical indifference."[5] It is true that literature carries no formal legal authority. For instance, a defense attorney's citation of *Macbeth* to establish her client's insanity defense in a murder trial would be sheer absurdity, if not malpractice.

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[1] WILLIAM SHAKESPEARE, HAMLET act 2, sc. 2.

[2] Ray Forrester, *Supreme Court Opinions—Style and Substance: An Appeal for Reform*, 47 HASTINGS L.J. 167, 173 (1995) ("Under the American version of the Rule of Law, judicial opinions serve the function of explaining and justifying the exercise of power case by case. Within our system of judicial supremacy, written opinions become the judicial concession to democracy—to the exercise of elitist power over a mass of consenting subjects.").

[3] *See* Garrett Epps, *Clarence Thomas is in the Wrong Line of Work*, THE ATLANTIC (Mar. 7, 2019), https://www.theatlantic.com/ideas/archive/2019/03/clarence-thomas-thinks-he-knows-best/584263/ [https://perma.cc/Z8RK-G5EN] ("But a judge is not God, just a public employee elected by nobody. Judges who don't limit their ambitions accordingly betray the oath . . . A judge's job is to apply that precedent to new facts—and explain convincingly why a given result flows from it, or why courts should in this case break with it.").

[4] *See* David A. Skeel, Jr., *Lawrence Joseph and Law and Literature*, 77 U. CIN. L. REV. 921, 925 (2009) (chronicling how modern legal education "drove a wedge between law and literature").

[5] BENJAMIN N. CARDOZO, LAW AND LITERATURE (1931), *reprinted in* CARDOZO ON THE LAW 3–4 (1982).

Nonetheless, judicial citations to canonical authors, from Shakespeare, to Dickens, to Yeats, to Vonnegut have persisted into the twenty-first century.[6] Indeed, Justice Scalia holds the mantle of being the most literary Supreme Court Justice in American history, at least in terms of citation to canonical authors.[7] The frequent literary allusions and citations that populate judicial opinions should lead the careful student of the law to ask if and why literary language is important when employed by judges.

This legal reader can reach two possible conclusions: either (1) invocations of canonical literature are ornamental or (2) literary references play a substantive role in judicial opinions.[8] Rephrased, references to canonical literature are either something or nothing. This Article concedes that literary allusions may sometimes be used by some judges in an ornamental function, e.g., to grab the reader's attention or to simply reference a judge's favorite author. However, this Article argues that literary allusions play a pivotal role in informing and influencing judicial opinions. Judges, in their official capacity, write about the law, society, justice, and American liberal democracy. Because judicial opinions have a direct effect on American laws and mores, a legal audience ought to take judges seriously when the bench grounds arguments in literature and uses precious space in opinions to direct the reader to a canonical literary text.[9] In short, judicial usage of canonical literary citations can and should be interpreted as a phenomenon that substantially impacts the theory and practice of American law, as opposed to mere ornamentation or rhetorical flourish.

This Article contends that citations to the Western literary canon are particularly important to judges who draw upon a natural rights or natural law framework. Part II of this Article will briefly summarize the content and history of the Western canon. The Western canon is comprised of unusually insightful commentators on the human condition, meaning there is a kinship between canonical literature and natural law because both purport to be grounded in universal truths discoverable by reason. Part III explores the impact of secularization on American judges in issuing opinions amenable to natural law and natural rights jurisprudence. As revelation began to falter as a commonly accepted justification for natural rights or natural law, judges with a natural rights or natural law perspective faced a crisis of authority in which to

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[6] *See infra* Part II.B.

[7] *See* Ami A. Dodson & Scott Dodson, *Was Antonin Scalia the Most Literary Supreme Court Justice?*, LITERARY HUB (Feb. 15, 2016), http://lithub.com/was-antonin-scalia-the-most-literary-supreme-court-justice/ [https://perma.cc/98RB-376V] (chronicling literary cites by Supreme Court Justice).

[8] *See* William Domnarski, *Shakespeare in the Law*, 67 CONN. B.J. 317, 327 (1993) (distinguishing between ornamental and substantive citations of Shakespeare in judicial opinions).

[9] For example, a federal district court in New Jersey "found direction in the last stanza" of William Butler Yeats's poem "Among School Children." Freeman v. Fischer, Civ. Action No. 03–3140 (KSH), 2012 WL 12902914, at *13 (D.N.J. Aug. 30, 2012).

ground their opinions. Part IV argues that the Western canon filled this authority vacuum by providing a commonly accepted fount of wisdom, i.e., literature. This project succeeded because insights found in the Western canon make natural law or natural rights jurisprudence more palatable to citizens. Part V concludes by surveying challenges to the Western canon as exclusionary of historically marginalized perspectives and exploring how the concept of a canon survives historicist claims that foundational literary texts function as oppressive relics penned by dead white European men.

Importantly, this Article identifies natural law and the Western canon as kindred concepts. Both allege to offer timeless wisdom that can guide human flourishing and are thus similarly rigid;[10] a legal principle or social more cannot easily enter the canon or be considered a tenet of natural law. Absent belief in the bedrock notion that there is an enduring wisdom or justice outside of positive law or social constructs, both natural law and the Western canon lose their authoritative weight. Although natural law and the Western canon exist outside the bounds of positive law, such unwritten principles play a vital, substantive role in legitimizing judicial opinions.

II. A CANON BY ANY OTHER NAME: DEFINING THE WESTERN CANON AND OBSERVING ITS ROLE IN JUDICIAL DECISION MAKING

The canon surrounds us. From Barnes and Noble classics, to allusions in popular culture, to ubiquitous phrases such as Dante's "abandon hope all ye enter here" or Melville's "call me Ishmael," we can observe a pervasive belief that a collection of shared texts exists in Western, or at least American, culture.[11] This Part will first briefly explore the concept of canons and then conclude by observing how judges cite the canon in judicial opinions.

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[10] *See* Harvey Mansfield, *How to Understand Politics: What the Humanities Can Say to Science*, FIRST THINGS (Aug. 2007), https://www.firstthings.com/article/2007/08/004-how-to-understand-politics [https://perma.cc/2PPS-Z7C5] Mansfield first defends the value of literature because "[s]cience is unable to reach the major part of humanity except by providing us with its obvious benefits. Literature takes on the big questions of human life that science ignores[.]" Mansfield then champions the study of "the greatest names" in the humanities because "[h]uman greatness is the height of human importance, where the best that humans can do is tested, and it is the work of great individuals." Taken together, these statements demonstrate that the study of the greatest literary minds is essentially a quest for truth. This reflects John Finnis's description of natural law as investigating "the basic forms of human flourishing [that] are obvious to anyone acquainted, whether through his or her own inclinations or vicariously through the character and works of others, with the range of human opportunities." JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 371 (2d ed. 2011).

[11] *See* Michael Pantazakos, *Ad Humanitatem Pertinent: A Personal Reflection on the History and Purpose of the Law and Literature Movement*, 7 CARDOZO STUD. L. & LITERATURE 31, 41–43 (1995) (outlining the responses of various schools of thought to the existence of the western literary canon).

A. *Such Stuff as Dreams Are Made On: The Content and Contours of Canons*

Perhaps the simplest definition of the Western canon is the collection of texts that, as Judge Posner pithily remarks, "count as literature."[12] But this answer raises the equally fundamental question of who is doing the counting. Is it English professors? Cultural elites? The present democratic citizenry? Esteemed minds from the past? Like Odysseus, the prototypical literary protagonist, the very concept of the canon inheres of twists and turns.[13] To begin answering these questions, this Article first turns to Allan Bloom's treatment of the cultural revolution of the 1960s, when Western Civilization courses were criticized and began to curry disfavor in the American academy.[14] Published in 1987, Bloom's *Closing of the American Mind* became a surprise bestseller, perhaps reflecting an underlying American acknowledgement that the acceptance or rejection of a canon plays a key role in maintaining American society and the laws that govern it.[15] Bloom's castigation of American universities for abandoning the classical curriculum persists into contemporary debates over the pedagogical aims of law schools.[16]

Bloom contends that the modern American university, unmoored from justifying its curriculum on traditional canonical education, "offers no distinctive visage to the young person . . . [i]n short there is no vision, nor is there a set of competing visions, of what an educated human being is."[17] In other words, Bloom argues that American students are no longer developed in a teleological fashion towards being a cultured citizen because our society lacks a "particular view of the educated or civilized man as authoritative."[18] Bloom traces this alleged decline in American higher education to a

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[12] *See* Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1424 (1995).

[13] While this Article's treatment of the canon is careful to distinguish between core concepts like the canon's existence as a whole and the parts that make up this canon, exhausting the complexities of canonical formation and perpetuation is beyond the scope of this Article.

[14] *See generally* Gilbert Allardyce, *The Rise and Fall of the Western Civilization Course*, 87 AM. HIST. REV. 695 (1982) (discussing the development of the Western Civilization course and the factors that led to its demise in many institutions).

[15] *See* Donald Lazere, *'The Closing of the American Mind,' 20 Years Later*, INSIDE HIGHER ED (Sept. 18, 2007), https://www.insidehighered.com/views/2007/09/18/closing-american-mind-20-years-later, [https://perma.cc/GH96-EVZC].

[16] *See* Steven Lubet, *Closed Minds and American Law Schools?*, 75 CORNELL L. REV. 949, 952 (1990) (defending Bloom's position that abandoning the traditional curriculum weakened higher education in America).

[17] ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND 337 (1987).

[18] *Id.* at 338.

diminished acceptance of Western civilization as the guide to enlightenment and society's corresponding rejection of the great books curriculum.[19]

Liberal education, according to Bloom, "means reading certain generally recognized classic texts."[20] These texts reflect "the first principles with which we interpret the world" and "prepare[] the way for the discussion of a unified view of nature and man's place in it, which the best minds debated on the highest level."[21] For Bloom, the Western canon is a repository of instructive knowledge and insights that allows Western citizens to communicate with each other in a shared moral language.[22]

An education in the Western canon, what Allan Bloom and Leo Strauss refer to as a liberal education,[23] aims at preparing young people for citizenship. Noting the etymological kinship between the English word "culture", the Latin word *cultura*, and "agriculture," Leo Strauss underscores how the phenomenon of culture intimately relates to the development of human beings in a definitive, as opposed to a relativistic, manner.[24] It is only through "constant intercourse with the greatest minds," according to Strauss, that a human being can become developed or cultured.[25] In short, the Western canon functions as a didactic tool wielded by human beings to distinguish wisdom from mere opinion, or at least to give educated citizens a common tongue for such inquiries.[26] By engaging with the greatest minds, the ones who crafted and refined the first principles of Western society, a student can experience a process akin to the teleological development described by Aristotle in the *Politics*.[27]

Such a robust concept of a Western canon is not without its critics. Harold Bloom, in his famous attempt to catalogue, or at least outline, the contents of the canon, notes that "[t]hose who oppose the [c]anon insist that there is always an ideology involved in canon formation; indeed, they go farther and speak of the ideology of canon formation, suggesting that to make a canon (or

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[19] *Id.* at 339 (describing the college curriculum as a carnival barker attempting to lure students into sideshows, but ultimately unable to offer a coherent and whole education).

[20] *Id.* at 344.

[21] *Id.* at 346–47.

[22] *Id.* (arguing that the most important facet of the Great Books curriculum is a shared experience in approaching big picture, universal questions).

[23] *See* BLOOM, *supra* note 17, at 44; Leo Strauss, *What Is Liberal Education?*, DITEXT.COM (June 6, 1959), http://www.ditext.com/strauss/liberal.html [https://perma.cc/2PFW-MP5C].

[24] Strauss, *supra* note 23.

[25] *Id.*

[26] *See* BLOOM, *supra* note 17, at 344.

[27] Aristotle contends, "[f]or what each thing is when fully developed, we call its nature . . . the final cause and end of a thing is the best." This leads Aristotle to assert that, "man, when perfected, is the best of animals." GEORGE C. CHRISTIE & PATRICK H. MARTIN, JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW 41 (3d ed. 2008).

to perpetuate one) is an ideological act *in itself*."[28] In other words, there exists a popular cynicism that claims that the canon elevates certain works to cement or promote power structures. Such cynicism casts doubt upon the mere possibility of a canon, asserting the impossibility of objective claims that a certain text or writer should be categorized as great. Opponents of Bloom therefore argue that the canon has been wielded to entrench the interests and values of wealthy Western white men and make the relativist claim that no text is, by virtue of wisdom or aesthetics, categorically better than another.[29] These arguments attempt to erode the alleged role of the canon as reinforcing traditional power structures by invoking the absurd image of a single person declaring that each possible text is or is not canonical.[30] Indeed, the canon looks rather foolish when one imagines drawing a line between which Hemingway short stories are canonical or figuring out exactly which authors to include from a given period. Rephrased, it is undeniably unfeasible to ask scholars or readers to compare the canonicity of twentieth century British novelists like Kingsley Amis, Evelyn Waugh, J.R.R. Tolkien, Virginia Woolf, and Anthony Powell, not to say anything of comparing them to Austen, Chaucer, or Dickens (and all of that must be done before even moving past the British Isles or even considering poets or playwrights).

Despite arguments challenging the concept of a canon, we may still claim some literary works are more reputable or valuable than others. For example, it is intuitively objectionable to place popular novels like *Fifty Shades of Gray* and *Twilight* on equal footing with Shakespeare, Tolstoy, and Joyce.[31] Although Harold Bloom's functional description of the canon as "what has been preserved out of what has been written"[32] would alleviate this tension, it still seems unsatisfactory to believe the preservation of certain texts has been

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[28] HAROLD BLOOM, THE WESTERN CANON: THE BOOKS AND SCHOOL OF THE AGES 22 (1994).

[29] DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW 15 (1997) ("An approach sometimes labeled 'deconstruction' has swept through universities, altering the landscape in discipline after discipline. The goal of the deconstructionist is to expose, or deconstruct, the underlying subjectivity and indeterminacy of everything we thought we knew. Radical multiculturalists adopt this approach, attempting to deconstruct such fundamental concepts as truth, merit, and law."). The authors go on to critique legal realism and critical legal studies as teaching that "legal principles are infinitely flexible and decisions depend on what the judge had for breakfast." *Id.* at 18. Such movements are a dangerous corrosive to the belief that "[a]t least since the Enlightenment, knowledge has been thought of as universally accessible and objective" and that "[s]omething counts as knowledge not because of its pedigree but because of its content." *Id.* at 27.

[30] *See id.* at 25–26.

[31] MOD. LANGUAGE ASS'N, REPORT TO THE TEAGLE FOUNDATION ON THE UNDERGRADUATE MAJOR IN LANGUAGE AND LITERATURE 6 (Feb. 2009), https://apps.mla.org/pdf/2008_mla_whitepaper.pdf [http://perma.cc/B85J-WD9V] (recognizing the existence of literary masterpieces and the importance of exposing students to such works).

[32] *See* BLOOM, *supra* note 28, at 17.

independent from artistic merit. Even viewing the selection of canonical texts as a free-market process concedes that popularity, and not merit, defines the canon. As with biological evolution, the enduring appeal of certain ideas and texts from one generation to the next cannot be coincidental, arbitrary, or accidental.

B. *All Ye Know on Earth, and All Ye Need to Know: Examining Literary Citations in Judicial Opinions*

Considering the connection between the Western canon and the development of cultured citizens discussed in the above Part, it should be no surprise that judges invoke canonical texts in their opinions. Indeed, Judge Posner remarks, "[j]udges can obtain insights from literature that have nothing to do with effective presentation or persuasion but have rather to do with the spirit, meaning, or values found in literature, and so in a rough sense with content rather than just form."[33] For instance, Justice Scalia refers to the works of Kafka, Carroll, Orwell, and Vonnegut in a single paragraph while dissenting in *PGA v. Martin*.[34] Even more impactful, the infamous "all deliberate speed"[35] clause in Chief Justice Warren's *Brown v. Board* decision sprung from Francis Thompson's poem "Hound of Heaven."[36] The operative legal phrase that shaped implementation of the Supreme Court's desegregation imperative, in fact, originated in poetry.[37]

Justices Scalia and Warren are not rogue members of the judiciary in their citing of canonical literature. Indeed, American courts have cited Shakespeare alone almost 800 unique times in official opinions.[38] The law and literature movement claims that these literary citations possess meaning because "reading fiction can provide judges with knowledge about how to solve real world problems."[39] For example, Judge Brann begins his opinion in *Mifflinburg Telegraph, Inc. v. Criswell* with an invocation of Dostoyevsky, particularly the psychological manifestations of guilt when dealing with state authorities.[40] Referring to "physical actions and reactions that demonstrate

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[33] RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 299 (1988).

[34] PGA Tour, Inc. v. Martin, 532 US 661, 705 (2001) (Scalia, J., dissenting).

[35] Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955).

[36] Jim Chen, *Poetic Justice*, 28 CARDOZO L. REV. 581, 583 (2006).

[37] *Id.*

[38] *See* Domnarski, *supra* note 8, at 319.

[39] M. Todd Henderson, *Citing Fiction*, 11 GREEN BAG 2D 171, 172 (2008).

[40] Mifflinburg Telegraph, Inc. v. Criswell, 277 F. Supp. 3d 750, 757 (M.D. Pa. 2017) ("'In all literature, there is perhaps no more vivid example of a man wrestling with the knowledge of his own guilt than that of Raskolnikov in [Fyodor] Dostoyevsky's Crime and Punishment.' 'Throughout Crime and Punishment, Dostoyevsky provides examples of physical actions and reactions that demonstrate Raskolnikov's consciousness of his guilt . . . such as Raskolnikov's psychosomatic illness and his internal monologue.' . . . Here, there is no murder. But there was stealing. Although the matter

Raskolnikov's consciousness of his guilt" in *Crime and Punishment,* Judge Brann establishes a framework for analyzing the mendacity of the defendant who violated the Pennsylvania Uniform Trade Secrets Act.[41] In a case determined by evaluating the veracity of the defendant, Judge Brann invoked Dostoyevsky's treatment of the psychological effects of guilt.[42] Ultimately, the opinion in *Mifflinburg Telegraph* channels a canonical literary exploration of guilty conscience to create a binding legal decision.

Although the law and literature movement identifies a kinship between literary texts and legal texts, there is a wide range of opinions on the degree and nature of this relationship. The most cautious observers simply posit that encountering great books leads to improved writing and critical thinking skills, but do not believe that literature can answer substantive questions of law.[43] From that perspective, literature simply improves a legal writer's understanding of good prose and a quote from the canon might suffice as a rhetorical flourish. Other commentators find a deeper connection between law and literature in narrative structure, as the compelling stories told by literature instruct legal writers how to weave yarns that favor their client.[44] Yet legal scholars like Richard Weisberg and Martha Nussbaum go a step further, arguing that literature can produce a substantive impact on judges, i.e., that canonical literature may influence the morality and rationality incumbent in judicial decision making.[45] For instance, the Fifth Circuit's understanding of corporate management in *Deus v. Allstate* grounded itself in two works of canonical drama, Arthur Miller's *Death of a Salesman* and David Mamet's *Glengarry Glen Ross.*[46] Scholars like Weisburg and Nussbaum contend such

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turns on the undisputed facts of this case, Defendant Heidi Criswell's *pro se* representations, written in the third person as if to distance herself from her own actions, are an admixture of consciousness of guilt and an attempt to convince the Court of her unbelievable naivety, leading me to the ineluctable conclusion based on the record of this matter that, despite her vociferous protestations to the contrary, there is a distinct absence of mistake here.").

[41] *Id.* at 757, 799.

[42] *Id.* at 757.

[43] *See, e.g.*, Daniel J. Kornstein, *A Practicing Lawyer Looks Back on Law and Literature*, 10 CARDOZO STUD. L. & LITERATURE 117, 117–18 (1998) (examining why practicing lawyers do not read and reflect on "books and plays" to bolster their understanding of the law).

[44] *See* Skeel, *supra* note 4, at 928 (referring to "legal storytelling" as a "branch of [the] law and literature [movement]" and discussing Derrick Bell and Patricia Williams—pioneers in this area—who "crafted their own first-person accounts of race and gender discrimination").

[45] *See* James Seaton, *Law and Literature: Works, Criticism, and Theory*, 11 YALE J.L. & HUMAN. 479, 479–91 (1999) (discussing the views of Weisberg and Nussbaum on the relationship between law and literature and comparing their views with other legal scholars).

[46] Deus v. Allstate Ins. Co., 15 F.3d 506, 514 (5th Cir. 1994) ("The tragic heroism of Willy Loman in THE DEATH OF A SALESMEN and the furious sales competition of David

literary references are not merely rhetorical flourishes, but actually guide judicial understanding, or at least judicial explanation, of human interactions in a substantive manner.[47]

The contribution of canonical literary works to judicial treatment of justice and society extends far beyond mere rhetoric. Indeed, the teachings embedded in canonical literary texts provide lessons to judges that Weisburg finds necessary "to revitalize the ethical component of law" and guide our jurisprudence to its "humane roots."[48] Because literature instructs the underlying ethical considerations required by justice, Weisburg offers "the literary text as a potential gold mine of knowledge about law."[49] Accordingly, Weisburg argues "[t]here is a reason why, these days, lawyers are furthering the return to the Great Books. We feel—perhaps more keenly than do the literature professors—the risks of having another generation lost to these sources of . . . professional and human wisdom."[50] If literature offers substantive instruction to judges, then the Western canon is the most fecund source of insight.

This connection between law and literature impacts judges in particular. Nussbaum argues for the superiority of the "literary judge" over judges who are not informed by literature.[51] She begins with the contention that "the law is a humanistic as well as a scientific field, and that its excellences include the special excellence of practical reasoning as they are understood in the humanities."[52] Therefore "the literary judge," or the judge guided by literary insights, "will not tailor her principles to the demands of political or religious pressure groups" because such a judge "does not gush with irrelevant or ungrounded sentiment" and is able to "examine [social] realities searchingly, with imaginative concreteness."[53] Literary knowledge therefore affords a judge both neutrality and empathy that commingle to create an objective sense of wisdom and judiciousness. But, even more so, literature "provides insights that should play a role . . . in the construction of an adequate moral and political theory."[54] Justice Breyer illuminates this concept in the following excerpt from his confirmation hearing:

> I was reading something by Chesterton, and he was talking about one of the Brontes, I think her Jane Eyre. He says you go and look out at the city—I

Mamet's GLENGARRY GLEN ROSS suggest that salesmen such as Deus [the Plaintiff] come to tolerate management pressures that many would consider to be beyond the pale.").

[47] *See* MARTHA C. NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE (1995); RICHARD WEISBERG, POETHICS: AND OTHER STRATEGIES OF LAW AND LITERATURE (1992).

[48] WEISBERG, *supra* note 47, at 35, 46.

[49] *Id.* at 34.

[50] *Id.* at 122.

[51] NUSSBAUM, *supra* note 47, at 82.

[52] *Id.* at 86.

[53] *Id.*

[54] *Id.* at 12

> think he was looking at London—and he said you know, you see all those houses now, even at the end of the nineteenth century, and they all look as if they're the same. And you think all those people are out there going to work and they're all the same. He says, but what Bronte tells you is they're not the same. Each one of those persons in each one of those houses and each one of those families is different, and they each have a story to tell. Each of those stories involves something about human passion. Each of those stories involves a man, a woman, children, families, work, lives—and you get that sense out of the book. And so sometimes I've found literature very helpful as a way out of the tower.[55]

Justice Breyer's invocation of Chesterton and Bronte demonstrates the profound impact of canonical literature on judicial visions of society, justice, and the legal system. Considering Justice Breyer's statements along with the above judicial opinions and scholarship, significant evidence demonstrates that judges can and do view literature as an instructive, and not a merely rhetorical, tool.

III. FROM CONSUBSTANTIAL TO INSUBSTANTIAL: THE EFFECT OF DECLINING AMERICAN RELIGIOSITY ON NATURAL LAW AND NATURAL RIGHTS JURISPRUDENCE ON THE AMERICAN JUDICIARY

Judicial reliance on canonical literature suggests that the insights of canonical authors have not been preserved on an arbitrary basis, but have endured as viable touchstones for fundamental legal and moral questions.[56] Even if great literary minds conflict, their teachings equip readers with compelling and competing alternatives to answer serious questions, e.g., what is the best human life, what is the relation of God and man, is the good life its own reward, are human beings capable of free will or blameworthy for their actions, etc.[57] A belief in absolute, as opposed to relative, answers to these questions links canonical literature and natural law jurisprudence. This Part explores the kinship between natural law and the Western canon. Additionally, this Part argues that the secularization of society weakened the traditional authority of natural law jurisprudence and thereby created an authority vacuum.

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[55] *Id.* at 79.

[56] *See supra* Part II.B.

[57] *See* ITALO CALVINO, WHY READ THE CLASSICS? 8 (1999) (describing the present as "noise outside our window, warning us of the traffic jams and weather changes outside" when compared to "the discourse of the classics which resounds clearly and articulately inside our room").

A. *Nature Never Did Betray / The Heart that Loved Her: A Brief Exploration of Natural Law, Natural Rights, Religion and American Legal Philosophy*

Beginning at least with the scholarship of Thomas Aquinas, natural law and religion have been intertwined.[58] If a higher code of law exists beyond the positive legal writings of a particular culture at a particular historical moment, religion would be an obvious source of such law. Laws predating man or derived from a higher, potentially inaccessible source could easily be described as revelation.[59]

However, revelation is not the sole path to natural law or natural rights. Many legal philosophers contend that natural law can be discerned by use of reason. When Ronald Dworkin addresses the proposition "that citizens have rights apart from what the law happens to give them,"[60] he permits the existence of an external repository of rights outside of those written in constitutions and revised codes. Framed differently, the question becomes whether "an American ever [has] the right, in strong a sense, to do something which is against the law[.]"[61] If a citizen has a moral right not codified in existing law, he or she must be using a standard wholly separate from positive law.

Illuminating the objective standard inherent in natural law, Professor Hadley Arkes opines that natural law begins "with an understanding of the things that [are] higher and lower in human nature."[62] Starting with the premise that certain rights, ideas, or truths can be evaluated objectively by the use of human reason, the concept of natural law unfolds as a result of this evaluative process. Whereas positive law is made, natural law is found.[63] Because ideas and laws are evaluated on an objective, natural standard, such a standard can be used to challenge the justice or wisdom of existing positive law.[64] Therefore, the diversity of laws and customs among peoples, and the

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[58] *See, e.g.*, J. Budziszewski, *Natural Law Revealed*, FIRST THINGS (Dec. 2008), https://www.firstthings.com/article/2008/12/natural-law-revealed [https://perma.cc/FR5B-Z2HH].

[59] *Id.*

[60] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 184 (Harvard Univ. Press 1977).

[61] *Id.* at 190.

[62] HADLEY ARKES, CONSTITUTIONAL ILLUSIONS AND ANCHORING TRUTHS: THE TOUCHSTONE OF THE NATURAL LAW 44 (2010).

[63] *See* Joseph C. Hutcheson, Jr., *The Natural Law and the Right to Property*, 4 NAT. L. INST. PROC. 45, 50–51 (1951) (taking a position against "the legal positivists who claim to see only 'the pure fact of law,' existing completely independent of, indeed, entirely apart from moral ideas and principles, [who] have no doubt looked down their noses at what they regard as this twaddle about natural law").

[64] LEO STRAUSS, NATURAL RIGHT AND HISTORY 92 (1953) ("Nature is older than any tradition; hence it is more venerable than any tradition. The view that natural things have a higher dignity than things produced by men is based not on any surreptitious or unconscious borrowings from myth, or on residues of myth, but on the discovery of nature

contradictions and disagreements between them, can be traced to an "insufficient grasp of natural right."[65] If judges are to follow a natural law or natural rights jurisprudence, then there will likely be scenarios when morality, as conceived by natural law principles, conflicts with positive law.

Judicial invocation of natural law and natural rights in issuing legal decisions does not escape criticism.[66] As the source of this law is not often identifiable or accessible to the general public, judges who employ natural law reasoning must take great care to avoid allegations of judicial activism usurping the democratic legislative process.[67] The unelected nature of American judges stokes suspicion when judicial opinions rely on natural rights explanations to alter or invalidate legislatively enacted laws crafted by democratic means.[68] For instance, scholars critique the *Lochner* era because it "endowed the Constitution with the Justices' own ideas of natural law."[69] Additionally, the Warren Court faces routine criticism for reading rights into the constitution to achieve political ends.[70] When judges appeal to extralegal arguments, or arguments driven by principle and not legislative text, their opinions are often decried as activist, no doubt because of the democratic

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itself . . . By uprooting the authority of the ancestral, philosophy recognizes that nature is *the* authority.").

[65] *Id.* at 100.

[66] *See, e.g.,* Eduardo M. Peñalver, *Restoring the Right Constitution?*, 116 YALE L.J. 732, 764 (2007) ("Some people will no doubt worry that the danger that natural law methodology will engender an untethered judicial activism makes even a progressive natural law constitutionalism unattractive.").

[67] *See* Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism*: *A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1096–97 (2005).

[68] Ronald Dworkin argues that, because codified law is not "the exclusive source of [moral] rights," judges often have to approach the law with principles found outside statutes and constitutions. RONALD DWORKIN, A MATTER OF PRINCIPLE 16 (1985). For instance, "[a] judge who follows the rights conception of the rule of law will try, in a hard case, to frame some principle that strikes him as capturing, at the appropriate level of abstraction, the moral rights of the parties." *Id.* at 17. The use of natural rights to inform judicial rulings made on principle appears to the academic community and democratic citizens as a facile way to cloak political decisions, which are inappropriate for judges who merely interpret the law. *See id.* at 10–11.

[69] Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 6 (1993).

[70] David Luban, *The Warren Court and the Concept of a Right*, 34 HARV. C.R.-C.L. L. REV. 7, 7 (1999). ("The Warren Court is dead. None of its Justices remain on the bench—indeed, only Justice White survives—and the recent history of the Supreme Court has been in large part a history of repudiating controversial Warren Court doctrines. Public opinion likewise repudiates Warren-style judicial activism, and constitutional scholarship—which as recently as the mid-1980s consisted in considerable measure of theoretical defenses for Warren Court-inspired methods of interpreting the Bill of Rights—has grown increasingly skeptical of expansive interpretive strategies.").

skepticism towards a system of allegedly neutral judges divining truths unobservable to ordinary citizens and legislators.[71]

This democratic suspicion against using natural law or natural rights in judicial opinions creates a problem of authority for natural law jurisprudence in judicial chambers.[72] Our society has moved away from the *Lochner* era conception that "took as natural and inviolate a system that was legally constructed and took the status quo as the foundation from which to measure neutrality."[73] Accordingly, invocation of reason as ultimate authority for natural law risks failing because many individuals may claim their interpretation of the law is justified by impartial reason. As there is no readily available omniscient intermediary to evaluate claims based on an objective, natural standard, competing claims of natural law would create chaos and not clarity.[74]

Considering the compulsion for judges to base natural law opinions in acceptable authority, it is no surprise that religion played a major role in early American legal thought. Indeed, the famous natural rights declaration that "[w]e hold these *Truths* to be *self-evident*, that all Men are created equal, that they are *endowed by their Creator with certain unalienable Rights*" is quite literally the first expression of American legal philosophy.[75] American independence, and the legal system the Founders had in mind, grounded itself in natural rights given to human beings by God.[76] In short, our Republic was founded on the comingling of natural law and religion.[77]

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[71] *See generally* Eric Dean Hageman, Note, *Judicial Candor and Extralegal Reasoning: Why Extralegal Reasons Require Legal Justifications (And No More)*, 91 NOTRE DAME L. REV. 405, 406 (2015) (identifying the tension between extralegal reasoning and preservation of the judiciary's legitimacy).

[72] This skepticism can be summed up by the following line of questioning: "If natural law exists, what is in it? Is it a blank slate on which anyone may write subjective beliefs? Does it include religious dogmas? If so, of what religions?" *See* Anthony Murray, *When Judges Believe in 'Natural Law'*, THE ATLANTIC (Jan. 27, 2014), https://www.theatlantic.com/national/archive/2014/01/when-judges-believe-in-natural-law/283311/ [https://perma.cc/R57T-CK9L].

[73] Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 882 (1987).

[74] Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 40 (1918) ("If . . . the truth may be defined as the system of my (intellectual) limitations, what gives it objectivity is the fact that I find my fellow man to a greater or less extent (never wholly) subject to the same *Can't Helps*.").

[75] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

[76] *See generally* George W. Carey, *Natural Rights, Equality, and the Declaration of Independence*, 3 AVE MARIA L. REV. 45 (2005) (discussing the underpinnings of the Declaration of Independence, including theories on natural rights).

[77] *See generally* Kody W. Cooper & Justin Buckley Dyer, *Thomas Jefferson, Nature's God, and the Theological Foundations of Natural-Rights Republicanism*, 10 POL. & RELIGION 662 (2017) (discussing theological influences on the Declaration of Independence).

B. *Look Upon My Works Ye Mighty and Despair: The Impact of Diminishing American Religion on Natural Law Opinions*

American skepticism of theology as the path to justice brought about a concomitant doubt over judicial reliance on natural rights and natural law. Judges, along with scholars, have found it difficult to formulate "how to defend the notion of rights in an age when theological derivations of rights from divine law or even from what used to be called 'natural law' were likely to be divisive from the start."[78] As compared to the Founding Era, Christianity's hold on American society has suffered a decline in influence.[79] Charles Lugosi asserts that the last century of legal history has been defined by a creep of secularism.[80] In his view, the "divine law is part of American jurisprudence" but has been reduced to a "fossilized heritage" in recent years.[81] Accordingly, a substantial percentage of Americans no longer believe that positive law can be evaluated on an external, divine standard.[82] For Lugosi, natural law has "theological roots" and thus faces pushback from an American public trending towards agnosticism and atheism.[83] In an increasingly secular society, citizens come to view law as merely "an arbitrary and capricious device" instead of a "derivation of eternal principles."[84] This historical movement away from the religiosity that undergirded natural rights doctrine at the American founding created an infertile soil for natural law jurisprudence.[85]

The impact of changing American religious beliefs on natural law cannot be understated. Joyce A. Little observes "religion and morality were recognized to make absolute claims upon us . . . [while] [p]olitics, on the other

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[78] JEFFREY ABRAMSON, MINERVA'S OWL: THE TRADITION OF WESTERN POLITICAL THOUGHT 323 (2009).

[79] *America's Changing Religious Landscape*, PEW RESEARCH CTR. (May 12, 2015) http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/ [https://perma.cc/B2JV-9E3V] (observing widespread decline in American Christianity in the twenty-first century).

[80] *See* Charles I. Lugosi, *The Rejection of Divine Law in American Jurisprudence: The Ten Commandments, Trivia, and the Stars and Stripes*, 83 U. DET. MERCY L. REV. 641, 641–42 (2006).

[81] *Id.* at 652.

[82] *America's Changing Religious Landscape*, *supra* note 79 (showing an eight percent decrease in American Christians between 2007 and 2014, as well as a six percent increase in religiously unaffiliated Americans).

[83] Lugosi, *supra* note 80, at 655.

[84] Robert J. Cosgrove, *Damned to the Inferno? A New Vision of Lawyers at the Dawning of the Millennium*, 26 FORDHAM URB. L.J. 1669, 1689 (1999).

[85] Keith Whitaker, *The God Killer*, CLAREMONT REVIEW OF BOOKS (Feb. 8, 2018), https://www.claremont.org/crb/article/the-god-killer/ [https://perma.cc/9JBE-UQBF] (observing that the death of God described by Nietzsche indicates that religious "demise is the very conclusion of the modern natural right tradition" because "there is no objective ground for right[.]").

hand, was understood to have a *relative* value . . . [t]oday, these things are reversed."[86] In other words, Little suggests Americans no longer believe in an external or fixed standard for evaluating good and bad, or just and unjust, actions. Because "[n]o God exists apart from whatever concepts of him we might cobble up, no moral demands are made on us beyond those we choose, or do not choose, to make."[87] The decline of American religion brought about a resulting doubt concerning the existence of an objective moral standard, which is the bedrock of natural law.

Because of a diminished faith in objective external standards and principles that supersede written law, the authority problem for judges amenable to natural law jurisprudence has become increasingly difficult to overcome. In a secular era where religion cannot provide a societal framework for categorizing certain acts or laws as objectively good or bad, and not simply illegal or legal, American natural law jurisprudence finds barren terrain to cultivate legal theory based on unwritten external standards.[88]

This decline in religion produced "value-neutral" technicians who cannot speak to the hearts and minds of citizens.[89] For a judge with natural law inclinations, this creates difficulties for persuading the public that the court's opinions are based in legitimate authority. Because such "hostility to[wards] religion is fairly new," having developed "in the middle of the last century," judicial chambers, or at least judges friendly to natural law, are still searching for a means of justifying natural law jurisprudence to a citizenry "losing . . . the traditional values that lie at the heart of our civilization."[90] This Article contends that citation to canonical literary works helps solve this authority problem that generates hostility towards natural law jurisprudence in an increasingly secular society.

IV. MAKING A HEAVEN OF A HELL: JUDICIAL CITATIONS OF THE CANON THAT AUTHORIZE NATURAL LAW OPINIONS IN A SECULAR WORLD

Considering the authority problem faced by judges espousing natural law in an era of increasing secularism, this Part asserts that literary citations, particularly canonical literary citations, can fill the authority void for natural law judicial authority. This Part will begin with a case study of Judge Willett's

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[86] Joyce A. Little, *Christianity and the Spirit of the Age*, *in* TOWARD THE RENEWAL OF CIVILIZATION 27 (T. William Boxx & Gary M. Quinlivan eds., 1998).

[87] *Id*. at 32.

[88] *See* Larry Arnn, *What We Can Know: Natural Law Properly Understood*, THE AMERICAN MIND, https://americanmind.org/features/academias-disease/what-we-can-know-natural-law-properly-understood/ [https://perma.cc/CGD6-3YHZ] (outlining the corrosive effects of relativism and historicism in the American educational system, particularly when subverting the natural law tradition).

[89] Cosgrove, *supra* note 84, at 1681.

[90] Robert H. Bork, *Courts and the Culture Wars*, *in* COURTS AND THE CULTURE WARS 10–11 (Bradley C.S. Watson ed., 2002).

concurrence in *Patel v. Texas Dept. of Licensing*. *Patel* demonstrates a robust natural law defense of economic liberty by employing a panoply of canonical literary citations. Accordingly, this Part argues that using the Western canon to justify natural law decisions is not merely an ornamental or rhetorical choice, but adds substantial authority to judicial holdings. In conclusion, this Part considers whether literary citation makes natural law palatable for certain types of legal readers or if it instructs judges in identifying natural law principles.

A. *What a Grace Was Seated on This Brow: A Study of the Literary Thread in Judge Willett's Patel Concurrence*

In an eye-raising move, Judge Willett wrote in favor of exempting a commercial eyebrow threading business from strict licensing laws because "liberty is not *provided* by government; liberty *preexists* government. It is not a gift from the sovereign; it is our natural birthright. Fixed. Innate. Unalienable."[91] By presenting economic liberty as a right preexisting positive law, Judge Willet's opinion suggests that natural law is the correct jurisprudential lens for determining whether regulation is too burdensome when weighed against the natural right to "earn an honest living."[92]

To bolster his natural law claims, Judge Willett makes two literary moves. First, he contends, "[i]nvalidating irrational laws does not beckon a Dickensian world of run-amok frauds and pretenders."[93] Second, Judge Willett invokes Shakespeare when explaining the judicial ability to overturn legislation "irrationally subjugating the livelihoods" of citizens, quoting the *Merchant of Venice*, "You take my house when you do take the prop / That doth sustain my house; you take my life / When you do take the means whereby I live."[94] Both quotes authorize the judicial power to overturn democratically enacted laws by invoking the authority of an unwritten higher principle of economic livelihood. The first quote employs Dickensian morality characters to distinguish judges from thieves, knaves, and crooks who subvert the law for their own gain. Further distancing judges from "quacks, swindlers, and incompetents," Judge Willett's citation of Shakespeare reveals the fundamental principle that deprivation of economic liberty can be equated to deprivation of a home.[95] In *Patel*, these literary references play a crucial role of explaining the judicial authority to overturn laws and the inherent justice of protecting economic liberty.

Judge Willett frames his concurrence with two propositions: we live in an age of "staggering civic illiteracy" and the law should guide citizens to the

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[91] Patel v. Tex. Dept. of Licensing and Regulation, 469 S.W.3d 69, 92–93 (Tex. 2015) (Willett, J., concurring).

[92] *Id.* at 93.

[93] *Id.*

[94] *Id.* at 101–02.

[95] *Id.* at 101.

"essential condition of human flourishing" because our laws "enshrine a *promise* (liberty), not merely a *process* (democracy)."[96] The latter contention reflects a principle that there is a repository of justice apart from positive law, while the former posits a doubt that today's citizens are attuned to such a standard. In a sense, Judge Willett is using his position on the bench to educate the citizenry in universal principles, principles grounded in canonical literature.

Judge Willett is not unique in either his evocation of natural law or his citation of literature from the Western canon. Indeed, Judge Wilkin in the mid-twentieth century declared:

> The principles, standards, and precepts of Natural Law are continually employed by courts as the constitutions, statutes, and precedents are interpreted and applied to the ever-varying circumstances of life. They are employed also in the interpretation of wills, contracts, conduct and relationships of life. They are part of man's nature and cannot be separated from his life.[97]

Although most judges with a natural law bent are not as candid, Judge Wilkin's account shows how a judge's worldview can be defined by natural law jurisprudence.

Accordingly, it should be no surprise that nearly half of literary citations used in judicial opinions appear in cases about constitutional rights and that the majority of such citations appear in dissents.[98] Employing literature to defend the concept of guaranteed rights allows judges to explain their position with an external authority; citing a canonical text allows a judge to bolster a judicial opinion with the wisdom of a writer believed to be a keen observer of the human condition. Considering that rights are abstract principles that shield citizens from codified law, extralegal justifications are an apt mechanism for empowering rights.

Take, for instance, Judge Reinhardt's reliance on canonical depictions of assisted suicide to bolster his natural rights argument in *Compassion in Dying v. Washington*, which advocates for a moral right of assisted suicide for the terminally ill.[99] In this case, Judge Reinhardt invokes Sophocles, Socrates, St. Augustine, Justinian, Cato, Shakespeare, Donne, and other canonical authors to explain the correctness of his suicide jurisprudence.[100] In the same literary vein, Justice Brennan cites George Orwell in *Florida v. Riley* to advocate for enhanced Fourth Amendment rights against aerial surveillance. He writes:

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[96] *Patel*, 469 S.W.3d at 92.
[97] Note, *Natural Law for Today's Lawyer*, 9 STAN. L. REV. 455, 494 (1957).
[98] *See* Henderson, *supra* note 39, at 179–80.
[99] Compassion in Dying v. Washington, 79 F.3d 790, 812 (9th Cir. 1996).
[100] *Id.* at 806–10, 821 (9th Cir. 1996).

> I hope it will be a matter of concern to my colleagues that the police surveillance methods they would sanction were among those described 40 years ago in George Orwell's dread vision of life in the 1980's: "The black-mustachio'd face gazed down from every commanding corner. There was one on the house front immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said . . . In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows." Who can read this passage without a shudder, and without the instinctive reaction that it depicts life in some country other than ours? I respectfully dissent.[101]

Indeed, canonical literary citation is particularly important in dissents, perhaps when a judge stakes a heterodox claim about a particular right. When literature informs judges, it does so about the fundamental questions about rights and operates unencumbered by positive law.

Canonical literature is an effective vehicle for challenging existing laws that appear unjust or unreasonable and for delivering extralegal principles in an acceptable medium to citizens. Attributing a moral or legal claim to a canonical writer provides more credibility to a judge than simply announcing that the judge is making a judgment that conflicts with existing law. As such, *Patel*, along with the other judicial writings cited above, illuminates how natural law judicial opinions possess an affinity for the Western canon and may draw on the authority of the canon to explain concepts to readers or to inform judicial application of natural law.

B. *A Mix'd Essence: Natural Law and the Double Nature of Rhetoric and Formation in Judicial Opinions*

Crafting judicial opinions requires two separate processes.[102] First, a judge must decide how to apply the law to a case.[103] This formative step requires evaluating how to apply the law, codified or otherwise, to a given factual scenario. Second, the opinion must be crafted to explain the judge's ruling.[104] This rhetorical stage is geared towards persuading legal readers and citizens of the correctness of the judge's application of the law. If a judge wishes to use literature to justify natural law elements of his or her opinion, the process will be different depending on if this occurs at the formative step or the rhetorical stage.[105]

This dual nature of judicial opinions leads to two competing views of the role of literary citations in natural judicial opinions. Either canonical literature

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[101] Florida v. Riley, 488 U.S. 445, 466–67 (1989) (Brennan, J., dissenting).

[102] Karl S. Coplan, *Legal Realism, Innate Morality, and the Structural Role of the Supreme Court in the U.S. Constitutional Democracy*, 86 TUL. L. REV. 181, 185 (2011).

[103] *Id.*

[104] *Id.*

[105] *See id.* at 185–95.

informs judicial opinions by providing access to eternal truths about the human condition, providing a sort of natural law or information about the natural law, or judges use literature in support of a natural rights position, meaning literature simply explains what the judge already knows.[106] This latter function touches upon the legal realist criticism of natural law as merely a guise for political preferences, i.e., that judges may dress up their preferences in the clothing of eternal, objective truths but in reality this is simply a strategy to further their own political preferences.[107] If literature is to have a substantive impact on judicial opinions, as opposed to merely providing rhetorical ornamentation, it cannot simply function to render judicial holdings digestible to the public. While such usage might alleviate the authority problem for natural law-oriented judicial opinions, it could not explain why judges find literature instructive. For instance, a judge who only uses literary citations to authorize her preexisting beliefs cannot be substantively influenced by the literary citation.

While judicial citations to canonical works may be helpful in persuading the general public that a judge's defense of natural law or natural rights is rooted in wisdom concerning the human condition, this explanation does not sufficiently establish the substantive function of literary citations. When judges claim that canonical literature informs their opinions about legal rights or shapes their world-view, it seems overly cynical to dismiss these statements as puffery or mendacity. Considering federal judges are unelected, the motive for judges to lie about the role of literature in their opinions is minimal. Furthermore, when judges cite literature in their opinions, that "literature becomes woven into the fabric of the law" because the concepts from the cited literary work gain precedential value, or at least function as instructive dicta to legal scholars, practitioners, and readers.[108] Indeed, the Tenth Circuit in *Lesley v. Oklahoma* found that it could not separate the "fiction" of Hugo's *Les Miserables* and the "facts" of the case at hand, because "the human equation runs through it all."[109] In short, the court in *Lesley* drew on Hugo's objective standard of what human beings would consider justice to require in a given fact pattern. When a legal or moral standard comes from a canonical literary work, it functions like a natural law, providing a judge an external standard for deciding what is the just and proper resolution of a legal dispute. Therefore

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[106] *See id.* at 188–90.

[107] *See id.* at 182–83 (describing the legal realism perspective that "rather than declaring what the law is, courts declare 'law,' making policy choices in the process. These policy choices are informed more by each individual jurist's background and sense of fairness than by formal reasoning from legal rules." This runs counter to both natural law arguments and recent "psychological research [that] has posited that a sense of fairness and justice may be innate and evolved in human nature[.]").

[108] John M. DeStefano III, *On Literature as Legal Authority*, 49 ARIZ. L. REV. 521, 529 (2007).

[109] Lesley v. Oklahoma, 407 F.2d 543, 547 (10th Cir. 1969).

literary citations should be viewed as legally significant in judicial opinions, at least when judges tell us that literature was instructive in the holding.[110]

C. *More Things in Heaven and Earth / Than Are Dreamt of in Your Philosophy: How Canonical Literature Addresses the Authority Problem in a Secular Era*

The Western canon functions in a similar manner to religion in cultivating a belief in transcendent or eternal standards that exist outside positive law.[111] As American society has become increasingly pluralist, it is more difficult to rely on a singular corpus of knowledge when attempting to create a dialogue with or between citizens.[112] Unlike the Founding Era, when Americans shared a worldview shaped by Protestant theology, today's society is not a monad when it comes to religious, intellectual, or cultural authority.[113] Even though the Western canon remains entrenched in the American intellectual psyche, many scholars reject the canon because it fails to reflect or represent American society at large.[114] Using substantive references to the Western canon in the twenty-first century poses more difficulties for judges than invoking the religion-based natural law of the past.

The secularization of American society, and the concomitant cynicism towards eternal standards, makes it difficult for a judge to openly ground his or her opinion in natural law. Even assuming that a judge could access natural law through reason or revelation, it would be exceedingly difficult to convince legislators and citizens of self-evident truths, particularly self-evident truths not already enshrined in our legal or political system. Considering that "literature can create meaning and an emotional response in ways unachievable by other citations,"[115] it is no surprise that judges use literary citations to make heterodox legal arguments, i.e., arguments that reject legal positivism in favor of natural law or natural rights.

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[110] Freeman v. Fischer, 2012 WL 12902914 (D.N.J. 2012) at *13 (claiming the court "found direction" in William Butler Yeats's poetry when deciding the legal issue of what constitutes billable hours).

[111] *See* HAROLD BLOOM, SHAKESPEARE: THE INVENTION OF THE HUMAN 3 (1998) ("What the Bible and Shakespeare have in common . . . is only a certain universalism, global and multicultural. Universalism is now not much in fashion, except in religious institutions and those they strongly influence. Yet I hardly see how one can begin to consider Shakespeare without finding some way to account for his pervasive presence in the most unlikely contexts: here, there, and everywhere at once.").

[112] Yuval Levin, *Pluralism, Individualism, and Religion,* NAT'L REV. (Mar. 24, 2014), https://www.nationalreview.com/corner/pluralism-individualism-and-religious-liberty-yuval-levin/ [https://perma.cc/Q4FX-89KX] (discussing the fractions in political and religious discourse caused by increasing pluralism in twenty-first century America).

[113] *Id.*

[114] *See* Henderson, *supra* note 39, at 172.

[115] *See id.* at 176.

As demonstrated above, judges may employ canonical literature as an external authority that guides their decisions. This move requires a tacit acknowledgement that the moral insights of literature can surmount positive, codified law.[116] Similar to religion in the eighteenth and nineteenth centuries, the Western canon provides a standard that judges may recognize for evaluating the rightness or wrongness of the parties before them that is not wholly dependent on statutes and constitutions. Indeed, the term canon originated as a biblical concept describing the genuine scripts of texture that represent God's word.[117] Because both religion and canonical literature provide "views about the 'ultimate' questions,"[118] it should not come as a surprise that judges rely on the Western canon to uphold extralegal natural rights in an era where religion is no longer a uniformly accepted authority.

V. COME YOU SPIRITS, UNSEX ME HERE: CONSIDERING THE CRITICAL RACE AND GENDER CRITIQUE OF THE WESTERN CANON AS HARMFULLY EXCLUSIONARY

Although the Western canon has traditionally been a commonly accepted source of wisdom about the human condition, recent movements in the academy have questioned the neutrality of the canon.[119] From this critical perspective, the canon does not offer enduring or eternal insight about the human condition, but is instead a mechanism of enshrining interests of the dominant class or race. Most authors comprising the Western canon are undeniably white, male, European or of European dissent, heterosexual, cisgender and, to some extent, upper-class.[120] This observation invites the critique of an exclusionary Western canon dismissive of views that are not historically privileged and useful as a political tool for maintaining the status quo under the guise of neutral and objective wisdom.[121]

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[116] *See id.* at 171–72.

[117] Bill Atkin, *Language and Anglican Canon Law—Dabbling Briefly into Another World,* 42 VICTORIA. U. WELLINGTON L. REV. 387, 388–90 (2011).

[118] Marc O. DeGirolami. *The Problem of Religious Learning*, 49 B.C. L. REV. 1213, 1256 (2008). Professor DeGirolami also observes, "It is worth noting that many canonical works of literature and art cannot be understood or appreciated adequately without some grounding in religion." *Id*. This further underscores how religion and canonical literature make similar types of universal claims about the human condition.

[119] *See* Francis Sempa, *If Destruction Be Our Lot*, CLAREMONT REVIEW OF BOOKS (July 23, 2014), https://www.claremont.org/crb/basicpage/if-destruction-be-our-lot/ [https://perma.cc/3UBG-EE6R] (describing the widespread academic abandonment of Western moral exceptionalism.).

[120] Coplan, *supra* note 102, at 192.

[121] *See* Sam Sacks, *Canon Fodder: Denouncing the Classics*, NEW YORKER (May 23, 2013), https://www.newyorker.com/books/page-turner/canon-fodder-denouncing-the-classics [https://perma.cc/Z9AS-LTEL] (challenging the conception of a classic literary text).

The American legal system and judiciary are not immune to these critiques; critical race theory and feminist legal theory contend that Western institutions function to perpetuate oppression of racial minorities, working and lower-class individuals, and non-males. For instance, a minority citizen employing critical race theory may be skeptical that "[a court] considers and speaks to a community in which she is included" when it issues an opinion binding that community.[122] Similarly, feminist scholars work to "uncover male bias and male norms in rules, standard, and concepts that appear to neutral or objective on their face."[123] Feminist scholars may be especially critical of the Western canon and the natural law tradition because of their opposition to "the temptation to speak in universal terms, a habit feminists detest in male-oriented scholarship and language."[124] As a particular class, race, or gender might assert universal terms to establish or entrench favorable power dynamics, the existence of a canon rightly creates skepticism that the contents of the canon may further a political agenda.

While many canonical works were penned in eras hostile to certain races, genders, and socioeconomic groups, this does not mean the Western canon is doomed or unavailing in a pluralist society. If the current literary canon is not persuasive to American citizens, it becomes ineffective in solving the authority problem for natural law judicial opinions.[125] The current critique that the Western canon is not equally accessible to or representative of all citizens, thereby engendering iniquity as opposed to universal knowledge, jeopardizes the validity of judicial opinions that rely on the substance of canonical texts.[126] A canon that serves the interests of the entrenched class certainly cannot be a guide for justice.[127] This likely means that natural law judges must evolve in

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[122] Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1568 (1989).

[123] MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 8 (3d ed. 2012).

[124] *Id.* at 7.

[125] For instance, a defective version of the Western canon appears as an artificial construct used to further the agenda of Western elites. *See, e.g.*, Pankaj Mishra & Daniel Mendelsohn, *How Would a Book Like Harold Bloom's 'Western Canon' Be Received Today*, N.Y. TIMES (Mar. 18, 2014) https://www.nytimes.com/2014/03/23/books/review/how-would-a-book-like-harold-blooms-western-canon-be-received-today.html [on file with *Ohio State Law Journal*] ("The long struggle against the totalitarian 'East,' which had helped make the 'West' seem a coherent entity from Plato to NATO, had ended. Since the 1960s, feminists, left-leaning theorists, African-Americans and other minorities had challenged the entrenched verities of academia and journalism.").

[126] *See*, *e.g.*, Henry Louis Gates Jr., *Whose Canon Is it Anyway?*, N.Y. TIMES (Feb. 26, 1989), https://www.nytimes.com/1989/02/26/books/whose-canon-is-it-anyway.html [on file with *Ohio State Law Journal*] ("[T]he teaching of literature is the teaching of values, . . . the teaching of an esthetic and political order, in which no person of color, no woman, was ever able to discover the reflection or representation of his or her cultural image or voice.").

[127] Because the canon plays a formative role in the development of American citizens, the literature read and valued by Americans impacts our society's vision of justice.

their citations of canonical literature or else the Western canon may suffer a similar diminishment in authority as American religion. This evolution could unfold in two ways; either society will recalibrate its conception of what is canonical or judges will select canonical principles that survive scrutiny when inspected for racism, sexism, classism, and all other bugaboos of contemporary American politics.

Fortunately, the canon is not impermeable. Authors regularly phase in and out of the canon. For instance, twentieth century African American female authors like Zora Neale Hurston, Zadie Smith, Toni Morrison, and Nella Larsen entered the canon by gaining acclaim in the academy.[128] The Eleventh Circuit not only cited Toni Morrison in a recent decision, but cited a passage in *Beloved* critical of the societal status quo.[129] As our society recognizes traditionally marginalized voices as being keen observers of the human condition, perhaps the Western canon will begin to reflect our contemporary values.

Even without substantial addition of minority viewpoints or reduction of white male authors, the traditional Western canonical works may be interpreted as "value-shattering and forward-looking sources for a just society."[130] Weisburg argues that the Western canon not only "feature[s] numerous works of women, minorities, and culturally diverse writers" but also "contains within it the seeds of a radical departure for Western culture[.]"[131] This phenomenon occurs because the ideas in the Western canon "inform their own iconoclasm."[132] Otherwise stated, Shakespeare's gender bending, Camus' existentialism, Homer's timeless depiction of heroic virtue, and Flaubert's condemnation of bourgeois pettiness belong to no race, gender, or creed. Indeed, the conception of justice that inspired Americans to view racism, sexism, and classism as evils originated in minds educated by our culture's indelible texts.[133] So long as insightfulness is the main criterion of the canon,

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See, e.g., Sarah Schutte, *More Virtue, Less Emotion Please: An Appeal to Writers—and to Readers*, NAT'L REV. (Oct. 13, 2018), https://www.nationalreview.com/2018/10/more-virtue-less-emotion-please-an-appeal-to-writers-and-to-readers/v [https://perma.cc/EM23-49NK] ("We as a culture must care about what we consume, and what we let our children consume, with respect to the written word. Feed them on the mighty deeds of heroes, the pure love of good mothers, the courage of ancestors, and the faith of children so that they may know how to live and how to live well.").

[128] Barbara K. Bucholtz, *On Canonical Transformations and the Coherence of Dichotomies: Jazz, Jurisprudence, and the University Mission*, 37 U. RICH. L. REV. 425, 440 (2003).

[129] United States v. Contreras, 739 F.3d 592, 596 (11th Cir. 2014) ("[A]s Toni Morrison observed, 'Definitions belong to the definers, not the defined.'").

[130] WEISBURG, *supra* note 47, at 47.

[131] *Id.* at 119.

[132] *Id.* at 121.

[133] *See* Mishra & Mendolsohn, *supra* note 125 ("The traditional canon—still prescribed, like intellectual medicine, on many a curriculum—is, in fact, good for you: It provides invaluable insight into the thinking in the past that has helped form the present.

judges may still identify guiding principles and morals from canonical texts without excluding historically marginalized groups.[134]

Cynics of judicial impartiality would likely scoff at the notion that the Western canon is politically neutral, particularly in the current era of identity politics. Henry Louis Gates Jr. succinctly summarized this view in *The New York Times*, wryly observing, "Pay no attention to the men behind the curtain, booms the Great Oz of literary history."[135] This critique is bolstered when noting that the slow evolution of the Western canon is likely outdone in sluggishness only by the judicial appetite to adopt new trends or rights.[136] However, the universality that attracts natural law judges to the Western canon could prove appealing to an American populace desperate for unity in an era of division. If judicial opinions like *Patel* are to be believed, there is an objective standard of right and wrong that applies even as new and diverse voices gain prominence in America. So long as the canon adjusts accordingly or judges properly question principles drawn from the canon, there is still hope that the morality and rationality traditionally associated with canonical thinkers will remain accessible in the twenty-first century. That would indeed be a jurisprudential happily ever after.

Americans familiar with Enlightenment thinkers like Locke and Rousseau have a deeper understanding of their own polity because those authors profoundly influenced the founders.").

[134] *Id.* ("[I]ntellectual and cultural life in the West since the 1960s has been enriched by the representatives of a long invisible majority, even if some of them pointed too stridently to discrepancies in the self-congratulatory narratives of powerful white men. Their contributions have steadily expanded our notions of religion, literature and philosophy.").

[135] *See* Gates, *supra* note 126.

[136] *See* Henderson, *supra* note 39, at 171.